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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-629

ROBERT S. KLINE and JEANNE KLINE,

Petitioners,

v.

ANNETTE HEYMAN, individually; ANNETTE HEYMAN, as executrix of the Estate of Lazarus S. Heyman, deceased, late of Danbury, Connecticut; SAMUEL J. HEYMAN; ABIGAIL HEYMAN; TAMPA MALL, INC., a Florida corporation; THE EDWARD J. DeBARTOLO CORPORATION; EDWARD J. DeBARTOLO and MARIE P. DeBARTOLO, his wife,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT (DCA)

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT (DCA)

Petitioners pray that a writ of certiorari issue to review the judgment of the DCA entered in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the decision entered in this cause, captioned as above, 309 So.2d 242 (Fla App. 1975), petition for certiorari in the Florida Supreme

Court denied August 11, 1975, ____ So.2d ____. (*infra*, Appendices A and B).

JURISDICTION

The decision sought to be reviewed herein was entered February 26, 1975. (Appendix A). A timely petition for rehearing was denied by the DCA April 2, 1975. The Florida Supreme Court denied certiorari August 11, 1975. (Appendix B). This petition for certiorari was filed less than 90 days from the denial of certiorari. No extensions of time have been granted within which to petition for writ of certiorari.

Jurisdiction is based upon Rule 19-1(a), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The DCA declined to recognize the rule enunciated by this Court (citations *infra*) that proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and that the decision of a court sitting in another State is not entitled to full faith and credit in a suit brought within the land situs State. In the decision under review, the DCA held that the decree of the United States District Court, District of Connecticut (USDC) (Appendix C) that petitioner ROBERT S. KLINE has no right, title, or interest in certain Florida real estate (land and lease pertaining thereto) is entitled to full faith and credit in Florida, i.e., in the situs State's courts. It is respectfully submitted that the DCA's opinion not only presents a federal question of substance which was decided in a way not in accord

with applicable decisions of this Court, but additionally creates an entanglement with this Court's opinion in *Durfee v. Duke,* 375 U.S. 196, 84 S.Ct. 242, 11 L.Ed. 2d. 186 (1963), and therefore presents the following questions:

1. Is the decision of the court sitting in a non-situs State entitled to full faith and credit in the courts of the land situs State where the non-situs decree determines title as distinguished from acting upon the person claiming title?

2. Actually, part and parcel of 1, *supra,* is the non-situs court's determination that it has jurisdiction entitled to full faith and credit where that determination does not involve the *location* of the land?

CONSTITUTIONAL PROVISION

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . . US Const., art. IV, §1.

STATUTORY PROVISION

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. Act of June 25, 1948, c. 646, 62 Stat 947, 28 USC §1738.[1]

STATEMENT OF THE CASE AND FACTS

DCA Jurisdiction

Petitioners commenced the instant litigation on October 11, 1972 by filing their complaint in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, seeking title in the Florida land to the extent of 15 percent premised upon ROBERT S. KLINE'S payment therefor. It is not disputed that ANNETTE HEYMAN, owner of the property prior to July, 1971, accepted KLINE's payments of money equal to 15 percent of principal, interest and property taxes.

At the time of the above filing, October 11, 1972, respondent TAMPA MALL, INC. (TMI) was the fee owner of the subject Florida land, having taken title from HEYMAN in July, 1971 with notice of petitioners' claimed interest.

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[1] The progenitor of the present statute was enacted by the First Congress in 1790, 1 Stat 122.

The Act extended the rule of the Constitution to all courts, federal as well as state. Mills v. Duryee, 7 Cr. 481, 485. Davis v. Davis, 305 US 32, 40, 83 Led 26, 29, 59 S Ct 3, 118 ALR 1521.

The more ancient facts of the case are reported, *Heyman v. Kline,* 456 F.2d 123 (2d Cir., 1972). On February 12, 1970, HEYMAN filed suit in the USDC seeking damages for ROBERT S. KLINE'S breach of employment contract and demanding injunctive and declaratory relief to the effect that KLINE had no interest in the (Tampa) Florida real estate. Later, the USDC held KLINE and his lawyers in contempt of court for violating its *ex-parte* injunction against filing a title suit in Florida on February 13, 1970; that court denied KLINE'S demand for jury trial; and it ordered KLINE to release his interest in the Florida real estate. All aspects of the case were reversed. *ibid.* On October 10, 1972, this Court denied the HEYMAN petition for a writ of certiorari.

Having been under a stay order entered by the Second Circuit, that court having declined to vacate its stay after publishing its decision and opinion, *ibid.,* the petitioners filed their title suit in Florida on October 11, 1972, *supra,* the day after this Court denied certiorari.

However, after the Hillsborough County, Florida Circuit (trial) Court set the instant cause for trial to be conducted on May 21, 1973, the USDC in Connecticut set its remanded cause for jury trial on May 1, 1973. Inasmuch as the USDC trial consumed the entire month of May, 1973, the Hillsborough County Circuit Court was unable to conduct the trial for lack of parties and

their attorneys.[2] The USDC jury trial's disposition was a judgment decreeing that KLINE had no right, title or intereest in the Florida real estate on the ground that he had breached his employment contract with HEYMAN.[3] (Appendix C).

But, in July, 1971, pending the KLINE'S successful appeal to the Second Circuit, *supra,* HEYMAN had sold the land to TMI. (In view of KLINE'S payment for 15 percent, he asserted that HEYMAN was a constructive trustee). Although petitioners KLINES and TMI were parties to the Florida litigation, TMI was not a party to the Connecticut litigation. (Appendix C). Thus, no owner of the *legal title* was before the USDC. And, HEYMAN did not seek a conveyance of KLINE'S interest

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[2] What was KLINE to do? Although only Florida Courts had jurisdiction of the subject matter (land), he had to defend a breach of contract suit. As if doing so was not burdensome enough in HEYMAN'S "backyard", he could obtain no relief in his title suit because HEYMAN did not own the property and any judgment against her (as to the property) would not be *res judicata* as to TMI in the Florida title suit — obviously, TMI would assert that only Florida Courts had subject matter jurisdiction. Was KLINE to boycott the Connecticut suit or sit mute on the title issues under the circumstances of the USDC having no jurisdiction? The result would have been the same. See *Kissell Co. v. Farley,* 417 F.2d 1180, 1182-1183 (7th Cir. 1969), holding that any attempt to ignore the pending suit would result in a judgment against him.

[3] The Florida Circuit Court judge noted that the USDC probably erred in not severing the real estate interest from the employment contract. (Appendix D). We note parenthetically that the employment contract did not make employment a condition of KLINE'S taking title. (Appendix E). At this jurisdictional question juncture, we refrain from discussing such considerations as the statute of frauds and the parol evidence rule. However, the Court will note that the employment contract recognizes KLINE'S 15 percent interest. See italicized portion (Appendix E).

(or a release of his interest). Thus, KLINE could not seek title from HEYMAN, she having sold to TMI in July, 1971.

The USDC did not order KLINE to perform any act in relation to the Florida property; *it decreed that he had no interest in it.* (Appendix C).

Subsequently, the Florida Circuit (trial) Court entered FINAL JUDGMENT (Appendix D) holding that, although it believed that the USDC erred, the doctrine of res judicata (or collateral estoppel or estoppel by judgment) precluded it from decreeing title. Thereupon, it dismissed the petitioners' complaint.

From that dismissal, petitioners properly appealed to the DCA which subsequently held (Appendix A) that inasmuch as the USDC had *litigated the matter of subject matter jurisdiction,* it (title) could not be retried in Florida, situs of the land, citing *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963), wherein this Court held that when the question of subject matter jurisdiction, i.e., the *location* of the land, is once determined by the courts of one State, a second State must give full faith and credit to that determination.

However, as a factual matter, it was impossible for the USDC to judicially determine that Florida land lay within the boundaries of the State of Connecticut; whereas, in *Durfee v. Duke, supra,* this Court correctly held that once Nebraska courts had determined that certain land lay in Nebraska as opposed to Missouri, because of avulsion, the matter (jurisdiction premised upon location of the land) could not be retried in Missouri.

Petitioner ROBERT S. KLINE *contested* jurisdiction in the USDC in that (1) he pleaded by his answer that the USDC in Connecticut lacked subject matter jurisdiction, and (2) he filed in the United States Circuit Court of Appeals, Second Circuit, a petition for writ of prohibition against the USDC's continuance of the suit there to determine title to the Florida land. The Second Circuit denied the petition without opinion.

THE OPINION OF THE DCA

(Appendix A)

The DCA's opinion is grounded upon the constitutional principle of full faith and credit as outlined by this Court in *Durfee v. Duke, supra,* quoting therefrom 375 U.S. at 111:

> However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. *From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.* (Emphasis supplied).

However, the DCA omitted from its opinion the following from *Durfee v. Duke,* 375 U.S. at 107-108:

> *The Nebraska court had jurisdiction over the subject matter of the controversy only if the land*

> *in question was in Nebraska.* Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by avulsion or accretion. The respondent appeared in the Nebraska court and through counsel fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter of the controversy. After a hearing the court found the issues in favor of the petitioners and ordered that title to the land be quieted in them. The respondent appealed, and the Supreme Court of Nebraska affirmed the judgment after a trial de novo on the record made in the lower court. The State Supreme Court specifically found that the rule of avulsion was applicable, that the land in question was in Nebraska, that the Nebraska courts therefore had jurisdiction of the subject matter of the litigation, and that title to the land was in the petitioners. Durfee v. Keiffer, 168 Neb 272, 95 NW2d 618. The respondent did not petition this Court for a writ of certiorari to review that judgment. (Emphasis supplied).

Thus, as distinguished from a faulty application of legal principle, the DCA brought itself squarely in conflict with the principle enunciated by this Court that the USDC had jurisdiction only if the land lay in Connecticut.

In addition, the DCA opinion is seemingly grounded upon a principle which it labeled "in personam" rights, i.e., that ownership in the land was tied to KLINE'S employment contract with HEYMAN. However, the label constitutes a distinction without a difference from the principle that the USDC had jurisdiction only if the land lay in Connecticut because, as shown by the authorities *infra,* while a court in a non-situs State may enforce

an *in personam* decree against a litigant within its jurisdiction (where that decree does not decree title, acting only against the person), such a court may decree title only if the land is within the borders of the State where it sits. The USDC did not enter an *in personam* decree against KLINE (on the title issue).

REASONS FOR GRANTING THE WRIT

1. THE DCA HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN CONFLICT WITH THE FOLLOWING APPLICABLE DECISIONS OF THIS COURT: *Fall v. Eastin,* 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, 23 LRA NS 924 (1909); *Carpenter v. Strange,* 141 U.S. 87, 105-106, 11 S.Ct. 960, 35 L.Ed. 640, 647 (1891); *Olmsted v. Olmsted,* 216 U.S. 386, 30 S.Ct. 292, 54 L.Ed. 530, 25 LRA NS 1292 (1910).

In *Carpenter v. Strange, supra,* 141 U.S. at 103:

> There is no doubt whatever that a federal question is presented by this record . . .

And, 141 U.S. at 105-106:

> The real estate was situated in Tennessee and governed by the law of its *situs,* and while by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. *The court 'has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.' Hart v. Sansom,* 110 U.S. 151, 155 [28: 101, 103].

Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree (*Massie v. Watts,* 10 U.S. 6 Cranch, 148 [3: 181]), yet it does not follow that such a decree is in itself necessarily binding upon the courts of the State where the land is situated. *To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res.*

By its terms no provision whatever was made for Mrs. Strange in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, *the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts.* Story, Confl. Laws, §543; Whart. Confl. Laws, §§288, 289; *Watkins v. Holman,* 41 U.S. 16 Pet. 25 [10: 873]; *Northern Indiana R. Co. v. Michigan Cent. R. Co.,* 56 U.S. 15 How. 233 [14: 674]; *Davis v. Headley,* 22 N.J. Eq. 115; *Miller v. Birdsong,* 7 Baxt. 531; *Cooley v. Scarlett,* 38 Ill. 316; *Gardner v. Ogden,* 22 N.Y. 327.

The judgment of the Supreme Court of Tennessee is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. (Emphasis supplied).

By its terms, no provision of the USDC JUDGMENT (Appendix C) was made for its enforcement as against KLINE in respect of the Florida real estate. No conveyance was directed, nor was there any attempt in any way to exert control over him in view of the conclusion that the USDC announced.[4] Direct action upon the real estate was certainly not within the power of the USDC, and as it did not order KLINE to take any action with reference to it, and he took none, the courts of Florida were not obliged to surrender jurisdiction to the courts of or sitting in Connecticut over real estate in Florida, exclusively subject to its laws and the jurisdiction of its courts.

In *Fall v. Eastin, supra,* this Court held that a Washington State decree was subject to collateral attack in the State of Nebraska where the real estate was located. Therein, at 215 U.S. 11:

> . . . we think that the doctrine that the court not having jurisdiction of the *res* cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. . . .

In *Olmsted v. Olmsted, supra,* this Court held that the courts of New York were not required by the full faith and credit clause of the federal Constitution to give effect to a Michigan statute legitamizing children born prior to the marriage of their parents, so as to control the devolution of title to lands in New York under a will. At 216 U.S. 393:

> The question, therefore, is as to the title to real estate in the State of New York. Does the full faith

[4] It is obvious why the USDC did not direct KLINE to convey title to HEYMAN. She did not want title, having already conveyed it to TMI.

and credit clause of the Federal Constitution require that effect be given to the Michigan act of 1881 [393 under the circumstances which we have detailed]?

In Clarke v. Clarke, 178 U.S. 186, 44 L.Ed. 1028, 20 Sup.Ct.Rep. 873, the question was as to the effect to be given to a judgment rendered in the supreme court of South Carolina in the courts of the State of Connecticut, respecting real estate situated in the latter state. The South Carolina court held that a certain will worked an equitable conversion into personality at the time of the death of the testatrix of all her real estate, wherever situated, and that the excutor of the will was authorized to administer the same as personality, and to sell and convey the same for the purpose of executing the will. *The supreme court of Connecticut refused to follow the judgment of the supreme court of South Carolina, and the case was brought here under the full faith and credit clause.* This court, in disposing of the question, said:

"It is a doctrine firmly established that the law of a state in which land is situated controls and governs is transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in DeVaughn v. Hutchinson, 165 U.S. 566, 41 L.Ed. 827, 17 Sup.Ct.Rep. 461, where the court said (p. 570):

" '*It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances.* United States v. Crosby, 7 Cranch, 115 3 L.Ed. 287; Clark v. Graham, 6 Wheat. 577, 5 L.Ed. 334; McGoon v.

> Scales, 9 Wall. 23, 19 L.Ed. 545; Brine v. Hartford F.Ins.Co. 96 U.S. 627, 24 L.Ed 858.'" (Emphasis supplied).

Also, see *Huntington v. Attrill,* 146 U.S. 657, 666, 36 L.Ed. 1123, 1127 (1892) where the Court wrote:

> The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this Court has jurisdiction on this writ of error.

A full review of the cases demonstrates that this Court considers the matter a federal question whether full faith and credit were denied or the concept was improperly applied.

The DCA's opinion sought to be reviewed herein utilizes the *res judicata* principle as it pertains to the full faith and credit concept, citing *Durfee v. Duke, supra.* Therein, at 375 U.S. 109:

> The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it. "By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here." Riley v. New Your Trust Co., 315 US 343, 349, 86 L.Ed. 885, 891, 62 S Ct 608.

Thus, it is apparent that the terms are without difference for purposes herein.

Moreover, the United States Circuit Court of Appeals, Fourth Circuit recently had the matter before it. In *Humble Oil & Refining Company v. Copeland,* 398 F.2d 364 (4th Cir., 1968), at 367:

> . . . Texas courts, or federal courts sitting in Texas, have exclusive jurisdiction over actions to determine title to realty within Texas, and neither the decision of the South Carolina Supreme Court nor a decision of the United States District Court for the District of South Carolina would be *res judicata* in a suit brought in a Texas court. The leading case is Clarke v. Clarke, 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900). Mrs. Clarke, a resident of South Carolina, owned land in South Carolina and Connecticut. The Supreme Court of South Carolina held her will worked an equitable conversion into personality of all her realty. The Supreme Court of Connecticut refused to apply the South Carolina judgment and instead held that under the law of Connecticut, Mrs. Clarke's will did not convert her Connecticut realty into personality. The United States Supreme Court held that Connecticut was not required to give full faith and credit to the South Carolina judgment. *The Court stated that the effect of a will upon the status of land situated in Connecticut directly involved the mode of passing title to land, that the Supreme Court of South Carolina lacked jurisdiction over the subject matter, and consequently Connecticut "was not constrained to adopt the construction of the will which had been announced by the court of South Carolina."* . . . (Emphasis supplied).

We note that the *mode* of transferring title is of the essence of the rule that the situs State is not bound by the non-situs court's decre. Accordingly, it is for a Florida court to determine whether or not KLINE acquired title by payment for it as distinguished from the employment contract theory, footnote 3, *supra*. In *Clarke v. Clarke*, cited in *Humble Oil & Refining Company v. Copeland, supra,* this Court made the principle clear, i.e., it is for the situs State's courts to determine the *mode* of transfer.

Finally, where a State court's decision created an entanglement with prior decisions of the Court, it issued a writ of certiorari. See *Williams v. State of Georgia,* 349 U.S. 375, 380, 75 S.Ct. 814, 99 L.Ed. 1161 (1955). Inasmuch as the DCA surrendered jurisdiction to the USDC sitting in Connecticut, the land not being in Connecticut, the DCA has created the entanglement.

2. THE USDC'S "DETERMINATION THAT IT HAD JURISDICTION" IS NOT ENTITLED TO FULL FAITH AND CREDIT BECAUSE IT DID NOT IN FACT DETERMINE JURISDICTION.

The DCA's decision sought to be reviewed is grounded upon this Court's decision in *Durfee v. Durfee, supra.* Therein, the Court expressed two mutually exclusive jurisdictional concepts:

a. A court does not have jurisdiction to determine title unless the subject land is in the State where the court is sitting. *ibid,* at 375 U.S. 108.

b. On the other hand, if jurisdiction is in issue and the parties specifically litigate that issue, and the court determines that it has jurisdiction, that specific

jurisdictional determination is entitled to full faith and credit, and the court's determination on the merits cannot be collaterally attacked in another State's forum. *ibid,* at 375 U.S. 111.

It is an immutable truth that the subject Florida land was not *located* within the territorial boundaries of Connecticut. And the USDC JUDGMENT (Appendix C) does not purport to suggest that it determined jurisdiction in this sense. Of course, as shown by the DCA decision (Appendix A), the USDC in Connecticut determined "all issues" in a tenaciously litigated suit. The record shows that KLINE (a) pleaded that the USDC did not possess subject matter jurisdiction, and (b) he filed a petition for writ of prohibition which the Second Circuit denied. However, such matters do not mean that he litigated jurisdiction in the essential sense that the *location* of the land lay in Connecticut rather than Florida. To suggest that the USDC did litigate the *location* of *Florida land* would strain even the most metaphysical reasoning.

The DCA's decision relies upon *Durfee v. Duke* but specifically conflicts with it because, at 375 U.S. 108, this Court wrote:

> The Nebraska court had jurisdiction over the *subject matter* of the controversy *only if the land was in Nebraska.* (Emphasis supplied).

CONCLUSION

The USDC JUDGMENT (Appendix C) did not operate upon the person of KLINE who was within that Court's jurisdiction solely for purposes of the breach of employment suit, a purely transitory cause of action.

That JUDGMENT did decree or determine title to Florida land and, therefore, Florida courts are not bound by it. In *Carpenter v. Strange, supra,* the claimant ignored the New York judgment but the Tennessee courts rendered it full faith and credit. This Court reversed because the land was located in Tennessee and, therefore, title could be determined only in that State's courts. The cases are on "all fours". Petitioners were entitled to ignore the USDC decree as was the claimant in *Carpenter v. Strange, supra.*

Finally, we consider it appropriate to comment upon a matter which may assist the Court in its analysis of the facts and applicable law.

In *Heyman v. Kline, supra,* 456 F.2d at 127, footnote 3, the Second Circuit commented that KLINE's *in rem* argument "founders" on the case of *Massie v. Watts,* 10 U.S. (6 Cranch) 148, 3 L.Ed. 181 (1810). The Second Circuit wrote:

> "There Chief Justice Marshal distinguished between a quiet title proceeding and a case in which the relief requested might affect title, but title is dependent on the construction of a contract between two parties. In the latter case, a court of equity could take jurisdiction over the parties and order any necessary *equitable* relief. (citation omitted)" (Emphasis supplied)

We respectfully suggest that the Second Circuit's analysis was faulty and, in any event, inapplicable to this cause for the following reasons:

a. There is no contract to be construed. See Appendix E, the contract between KLINE and HEYMAN.

It is without dispute that KLINE had paid HEYMAN an amount of money representing 15 percent of the purchase price, interest, and real property taxes. The Court will observe that the "contract" (Appendix E) is not a contract for the sale of real estate at all. The italicized portion merely shows the HEYMAN recognition that KLINE had already decided to participate as a partner — he would be liable for his share as any other partner would. There is no contention that he failed to pay his share. Insofar as that language is concerned, it is not contractual.

b. The "contract" action of which Chief Justice Marshall wrote in *Massie v. Watts, supra,* was:

> ". . . But where the question changes its character, where the defendant in the original action *is liable to the plaintiff, either in consequence of contract, or as a trustee, or as the holder of legal title acquired by any species of mala fides practiced on the plaintiff,* the principles of equity give a court jurisdiction wherever the person may be found . . ." (Emphasis supplied) 10 U.S. (6 Cranch) 148, 3 L.Ed. at 185.

The distinctions are obvious: (i) there is no contention that KLINE was liable to HEYMAN for the conveyance of title — she had title, KLINE having paid for 15 percent of it; (ii) HEYMAN did not seek title from KLINE; (iii) there is no contention that KLINE acquired title at all, let alone by fraud.

c. The record before the Second Circuit did not show that, in July 1971, several months prior to its published opinion, HEYMAN had conveyed title (100

percent) to TMI. Thus, she sought no equitable relief against KLINE, and the USDC gave her none.

d. In 1973, when HEYMAN v. KLINE was litigated in the USDC, Connecticut, no holder of the legal title was before the court. There was none of the *Massie v. Watts* described equitable relief prayed for or granted. The owner, TMI, was not a party and the land was in Florida. Any contention that HEYMAN was entitled to relief against KLINE because she took a mortgage from TMI is without merit because, in Florida, a mortgagee is not entitled to maintain an action to quiet title. *Peninsular Naval Stores Co. v. Cox,* 57 Fla. 505, 49 So. 191 (1909); *Cook v. Pontious,* 96 Fla. 393, 123 So. 765 (1929).

e. Although the rule that a non-situs State court judgment affecting title is not entitled to full faith and credit (unless title is merely affected by the imposition of an equity order against a person) disposes of the matter, we necessarily anticipate the Rule 25(c), Fed.R. Civ.P., argument. The rule does not contemplate transfers in interest to persons who are not parties to the case. *Jordan v. Marks,* 55 F.Supp. 204 (W.D.La. 1944), affirmed 147 F.2d 800 (5th Cir. 1945). Thus, the fact that HEYMAN transferred title to TMI during pendency of the case (during appeal, *supra*) did not warrant the USDC deciding title (which it did not have jurisdiction to do in any event), and its judgment was not entitled to full faith and credit.

It is respectfully submitted, therefore, that the requested writ should issue.

JOHN R. BUSH of
MACFARLANE, FERGUSON, ALLISON
& KELLY
P. O. Box 1531
Tampa, Florida 33601
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies hereof have been served by United States mail, postage prepaid (airmail to Messrs. Schless & Sagarin), this 27th day of October, 1975 to:

Marvin E. Barkin, Esq.
P. O. Box 1102
Tampa, Florida 33601

John Lawson, Esq.
P. O. Box 1288
Tampa, Florida 33601

Peter J. Winders, Esq.
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Tampa, Florida 33601

J. Daniel Sagarin, Esq.
Schless & Sagarin
855 Main Street
Bridgeport, Connecticut 06603

Attorneys for Respondents.

JOHN R. BUSH

APPENDIX A

OPINION OF THE

DISTRICT COURT OF APPEAL OF FLORIDA,

SECOND DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

JANUARY TERM, A.D. 1975

CASE NO. 73-620

ROBERT S. KLINE and JEANNE KLINE,

Appellants,

v.

ANNETTE HEYMAN, individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury, Connecticut; SAMUEL J. HEYMAN; ABIGAIL HEYMAN; and TAMPA MALL, INC., a Florida corporation,

Appellees.

Opinion filed February 26, 1975.

Appeal from the Circuit Court for Hillsborough County; James S. Moody, Judge.

John R. Bush of Macfarlane, Ferguson, Allison & Kelly, Tampa, for Appellants.

Schless & Sagarin, Bridgeport, Conn. and Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, for

Appellees Annette Heyman, Samuel J. Heyman and Abigail Heyman.

Holland & Knight, Bartow, and Trenam, Simmons, Kemker, Scharf and Barkin, Tampa, for Appellee Tampa Mall, Inc.

HOBSON, Judge.

Appellants appeal a final judgment entered in the lower court which held that the appellants were estopped from prosecuting this suit on the grounds of "res judicata-collateral estoppel or estoppel by judgment."

The lower court found that all of the issues in this case were presented and determined in the United States District Court for the District of Connecticut. Appellants contend that the Connecticut case in effect was an *in rem* proceeding [suit to quiet title] and that such *in rem* proceeding must be brought in the state in which the real property is located, to wit, Florida. As to this question the appellees urge two theories of law: 1) that once the question of subject matter jurisdiction has been completely litigated in one state, it may not be retried in a second state, and, 2) that the appellants' claim to an interest in the land in Florida initially arose and stemmed from Mr. Kline's rights under an employment agreement and his relationship with the Heymans which are *in personam* rights.

We agree with appellees on both of the above positions. The question of jurisdiction of the Connecticut court was expressly, fully and fairly litigated in the Connecticut suit. The United States Supreme Court in Durfee v. Duke, (1963) 375 U.S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242, stated as follows:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitution-

ally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated in the court which rendered the original judgment."

There is no question but what all issues involved in the instant case were litigated tenaciously in the Connecticut suit which was an *in personam* action determining the rights between Mr. Kline and the Heymans. These *in personam* rights were the basis of the claims which the appellants assert established their interest in the real property in Florida. Our Supreme Court in Fraser v. Cohen, 1947, 31 So.2d 463, quoted with approval, the following from Pomeroy's Equity Jurisprudence:

" 'The power to act in personam, through their remedies, is still held by all courts of equity . . . Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted.' "

The Connecticut judgment determined by declaratory judgment the factual and legal issues upon which

the claims of the appellants are predicated in the instant case.

Appellants next contend that the parties in the Connecticut case are not identical to the parties in the instant case and, therefore, res judicata or estoppel by judgment does not preclude them from prosecuting this case. Mrs. Kline and Tampa Mall, Inc. were not parties to the Connecticut case. Tampa Mall, Inc. purchased the property involved from Mrs. Heyman, who was a party in the Connecticut suit, after the commencement of the Connecticut proceedings; therefore, it is in privity with Mrs. Heyman and is entitled to the benefits of the Connecticut judgment. This doctrine of privity is succinctly set forth in 1B Moore, Federal Practice, ¶0.411[1], p. 1252 (2d ed. 1965):

> "The doctrine of privity qualifies the requirements of identity of parties and mutuality, by extending the conclusive effect of a judgment to persons who were not parties to the earlier action, but are in privity with parties to it. . . . Thus, for instance, if B acquires property from A after the commencement of a suit between A and X involving A's title to the property, a judgment adverse to A in that suit also binds B, although B was not himself a party to that suit. And since B would be so bound, through privity with A, the requirement of mutuality is satisfied and B can invoke the conclusive effect of a judgment for A and against X."

Next, the appellants take the position that Mrs. Kline, not being a party to the Connecticut suit, the doctrine of res judicata or estoppel by judgment must fail. It is well settled that even though a party in a subsequent suit was not a named party in a prior suit, such party is bound by the prior judgment if he participated in the first proceeding or was represented by a party to that proceeding. In McGregor v. Provident

Trust Co. of Philadelphia, Fla. 1935, 162 So. 323, our Supreme Court stated:

> "There can be no question but that, in order for a person or corporation to be brought within the estoppel of the rule of res adjudicata, it is not necessary for him to have been a formal record party. His conduct may have been such as to give him the status of a party in actuality, and in such event the courts will not withhold from him the application of the rule because of the technical objection that he was not a party on the record. See . . . Plumb v. Crane, 123 U.S. 560, 8 S.Ct. 216, 31 L.Ed. 268. . . ."

The rule is well stated in an annotation, 58 ALR 701, at page 706:

> "Under the rules of privity a judgment against one spouse is binding upon the other spouse who was not a party to the litigation, where the non-party spouse was represented in the litigation by the party spouse as his or her agent, or has ratified the acts of the party spouse, or was virtually represented by the latter, or has participated in the litigation, or where the party spouse was the real party in interest or acted as trustee for the other, the cestui que trust."

Mr. Kline testified by deposition in this case that while pressing his claim in the Connecticut suit he had his wife's consent to represent her. His testimony is as follows:

> "Q Upon what basis, then, did you claim the entire 15 percent when you made that claim in the Connecticut action?
>
> * * * * *
>
> A (Continuing) Anything I do, or anything my wife does, we do it together, and we do it for each other.

Q But did you have your wife's consent to—

A Represent her?

Q Yes.

A Absolutely."

Mrs. Kline also in a deposition taken in this case testified as follows:

Q You have testified — or you were present during your husband's deposition this morning, were you not?

A Yes. Of course.

Q And I asked him whether or not — on what basis, after having given you an interest in his interest in the property, that he appeared and claimed the full 15 percent interest in the Connecticut action, and he indicated that you knew about it and authorized it. Is that true?

A Right.

Q And you did authorize it?

A Yes."

From the record in this case it is abundently clear that Tampa Mall, Inc. and Mrs. Kline were in privity with named parties in the Connecticut suit and are, therefore, bound by the Connecticut judgment.

For the foregoing reasons the eminent trial judge was correct in holding that the claims involved in this action are barred.

AFFIRMED.

McNULTY, C. J., and SCHEB, J., CONCUR.

APPENDIX B

ORDER OF THE

SUPREME COURT OF FLORIDA

DENYING PETITION FOR WRIT OF CERTIORARI

B-1

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1975

MONDAY, AUGUST 11, 1975

CASE NO. 47,256

DISTRICT COURT OF APPEAL, SECOND DISTRICT

73-620

ROBERT S. KLINE and JEANNE KLINE,
Petitioners,

vs.

ANNETTE HEYMAN, etc., et al.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c(6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C. J., ROBERTS, BOYD, OVERTON AND ENGLAND, JJ., CONCUR

Y

CC: Hon. Wm. A. Haddad, Clerk
Hon. James F. Taylor, Jr., Clerk
Hon. James S. Moody, Judge
Hon. John R. Bush
Hon. Peter J. Winders
Hon. Marvin E. Barkin
Holland & Knight
Schless & Sagarin

APPENDIX C

JUDGMENT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUNE 7, 1973

C-1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-12

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,
Plaintiffs,

-vs-

ROBERT S. KLINE,
Defendant.

JUDGMENT

This action commenced by complaint with plaintiffs seeking a declaratory judgment, injunctive relief, damages and other relief and defendant having filed his answer, defenses and counterclaim, said counterclaim seeking declaratory relief, injunctive relief, compensatory damages, punitive damages and other relief, and the action having come on for trial on the merits before the Court, and a jury (the Honorable T. Emmet Clarie, United States District Judge) and the issue having been duly tried, and the jury having duly rendered its verdict, upon special interrogatories and upon verdict forms attached hereto.

1. The plaintiffs are entitled to the declaratory relief as sought in the complaint and more specifically as follows:

(a) Annette Heyman, individually and in her capacity as Executrix of the Estate of Lazarus S. Heyman, does not hold a 15% interest in the 73 acres more or less of land in Tampa, Florida, more particularly described in Exhibits A and B of the submitted complaint filed May 9, 1973, and hereinafter referred to as the Tampa property in actual or constructive trust for Robert S. Kline.

(b) Annette Heyman individually and in her capacity as Executrix of the Estate of Lazarus S. Heyman, did not hold said 15% interest in actual or constructive trust for Robert S. Kline at the time she entered into a lease with Tampa Mall, Inc., a Florida corporation, said lease dated as of February 1, 1969, and at the time she sold said property to Tampa Mall, Inc. on July 12, 1971.

(c) Robert S. Kline's right to invest and to participate in the Tampa property was conditioned upon his promise faithfully to perform his contractual employment obligations to the plaintiffs.

(d) Robert S. Kline materially breached his employment agreements and obligations with the plaintiffs.

(e) The July 16, 1968 assignment of option was not and is not an effective instrument and was and is null and void.

(f) Robert S. Kline has no right, title, or interest in the Tampa property.

(g) Robert S. Kline has no right, title, or interest in the lease dated February 1, 1969, between Annette Heyman, landlord, and Tampa Mall, Inc., tenant.

(h) Robert S. Kline has no right, title, or interest in the proceeds of the sale on July 12, 1971 by Annette Heyman to Tampa Mall, Inc., of the Tampa property.

(i) The foregoing factual findings and conclusions, 1(a) through 1(h), are substantially set forth in the jury's answers and findings to the interrogatories attached hereto and are incorporated herein by reference.

2. Plaintiffs are not obligated to pay defendant, Robert S. Kline, any further compensation, commission, or other benefits.

3. Plaintiffs shall recover from the defendant the sum of $23,216.05 minus $13,591.62, representing money paid by defendant to plaintiff, Annette Heyman, leaving a net sum which plaintiffs shall recover from defendant pursuant to this paragraph of $9,624.43.

4. Interest shall accrue on $9,624.43, from May 26, 1973 at the legal rate.

5. Defendant's counterclaim asserted herein is denied in all respects on the merits; and judgment ordered entered thereon for the plaintiff.

6. Costs shall be taxed according to law in favor of the plaintiffs and against the defendant.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of June, 1973.

T. Emmet Clarie
United States Disrict Judge

APPENDIX D

FINAL JUDGMENT

CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT,

HILLSBOROUGH COUNTY, FLORIDA

JUNE 21, 1973

D-1

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

No. 213381 — Division E

ROBERT S. KLINE, et ux.,
Plaintiffs,

vs.

ANNETTE HEYMAN, etc., et al.,
Defendants.

FINAL JUDGMENT

This cause was set for trial beginning May 21, 1973 by order of this Court dated February 13, 1973. On May 2, 1973, the Court ordered a pre-trial conference for May 15, 1973. The attorney for the plaintiffs was at that time engaged in the trial of the case of Heyman v. Kline in the United States District Court for the District of Connecticut, Case No. B-12, and the pre-trial conference was continued from time to time. The Court requested memoranda of law from all parties concerning the res judicata or collateral estoppel or estoppel by judgment of the Connecticut action, which was pending at the institution of this law suit. Each of the parties filed memoranda on May 17, 1973 and supplemental memoranda thereafter. The Court continued the trial previously set for May 21 because the Connecticut action was still in trial at that time. On May 25, 1973 the Court rescheduled the pre-trial conference for 2:00 p.m. June 7, 1973.

The trial of the Connecticut case resulted in a jury verdict on May 25, 1973 adverse to Robert S. Kline, the defendant/counterclaimant in that case and one of the plaintiffs/counter-defendants in this case. At the pre-trial conference of June 7, 1973, lengthy oral argument on the res judicata issue was had. On June 7, 1973, the United States District Court for the District of Connecticut in the case of Annette Heyman, individually and as executrix of the estate of Lazarus S. Heyman, etc. v. Robert S. Kline, Civil Action No. B-12, rendered a Final Judgment, a certified copy of which is part of this record. The defendants have made appropriate motions to add defenses based on the Connecticut Judgment.

All the necessary portions of the Record in such Connecticut action are now part of the record in this case, including the amended Complaint, the amended Answer and Counterclaim, and the Reply to Counterclaim, the special interrogatories to the jury in that case and the responses thereto, and the general verdict for the Heymans in that case, together with a certified copy of the Final Judgment in that case. In addition the parties have had and have availed themselves of a full opportunity to bring before this Court relevant portions of the transcript of testimony and other portions of the record in the Connecticut action and the Court has been fully advised. The counterclaim in this action filed by defendant, Annette Heyman, in both her individual and fiduciary capacity, is substantially the same as the complaint in the Connecticut action; the counterclaim of defendant, Robert S. Kline, in the Connecticut action is substantially the same as the complaint here. The suit in Connecticut was a proceeding in personam to construe the terms of the contract and determine the rights of the parties thereto. It was within the Connecticut District Court's jurisdiction to determine the contractural rights of the respective parties and the consequent verdict and judgment is res judicata or estoppel by judgment of the issues in the pending litigation.

The Connecticut District Court may have erred in not ruling as a matter of law that the contractual interest of Kline in the Florida land was severable from the Connecticut employment contract but it was within the jurisdiction of that Court to adjudicate this question subject to Kline's right of appeal, and this Court does not reach the question.

Kline's rights as against Mrs. Heyman having been determined, he has no cause of action against Samuel J. Heyman, Abigail Heyman, or Tampa Mall, Inc. Estoppel by judgment is applicable to Mrs. Kline since the depositions of Mr. Kline and Mrs. Kline in this action, the testimony of Mr. Kline in the Connecticut action, filed herein, and other relevant portions of this record show that Mrs. Kline is bound by the outcome of the Connecticut action.

In short, it appears that all issues remaining in this action have been fully litigated and have been finally adjudicated on the merits between the same parties or their privies or persons who are bound. The Court finds that there are no genuine issues as to any material facts with regard to the defenses of res judicata/collateral estoppel or estoppel by judgment; that the defendants are entitled to summary judgment upon such defenses as a matter of law and that his case is one that is appropriate for summary judgment to be entered at pre-trial conference. Accordingly, it is thereupon

ORDERED, DIRECTED and ADJUDGED that

1. The motions of each of the defendants to supplement or amend their answers and defenses is granted, and the supplemental or amended answers are deemed filed.

2. The prior adjudication in the United States District Court for the District of Connecticut, Case No. B-12, is determative of the issues in this case and decides each of the issues in this case adversely to plaintiffs and in favor of defendants, and plaintiffs and defendants are bound thereby.

3. The request for declaratory relief in the counterclaim of defendant, Annette Heyman, involves the same issues as those in the Connecticut action. Plaintiffs, Robert S. Kline and his wife, Jeanne Kline, are, on the basis of such prior adjudication, entitled to no interest in the property involved herein, or the proceeds of the sale thereof or the proceeds of the lease. The question of damages for Robert S. Kline's breach of contract and the question of the amount of damages thereon have been litigated and adjudicated by the Connecticut court.

4. The Complaint and action be and the same are hereby dismissed with prejudice to plaintiffs, and plaintiffs shall take nothing by this suit and defendants shall go hence without day.

5. The notice of lis pendens filed herein and in Official Record Book 2559, Page 442, of the Public Records of Hillsborough County, be and the same is hereby discharged and cancelled.

6. The plaintiffs, Robert S. Cline and Jeanne Kline, are hereby determined and declared to have no right, title or interest in and to the real property which is the subject of this action, and is more particularly described in the attached Exhibit A, hereby made a part hereof, and any claims represented by the Assignment of Interest in Option Agreement and the copy of the Option Agreement attached thereto recorded in Official Record Book 2073, pages 963-966 and, Official Record Book 2078, pages 323-324, of the Public Records of Hills-

borough County, are declared invalid and said instrument is hereby expunged from the records.

7. Costs will hereafter be taxed against the plaintiffs.

DONE AND ORDERED in Chambers at Tampa, Florida this 21st day of June, 1973.

/s/ JAMES S. MOODY
Circuit Judge

APPENDIX E

AGREEMENT FOR THE EMPLOYMENT OF ROBERT S. KLINE BY THE OFFICES OF L. S. HEYMAN

E-1

AGREEMENT FOR THE EMPLOYMENT OF ROBERT S. KLINE BY THE OFFICES OF L. S. HYMAN

Our office agrees to employ you for a period of one year, September 1, 1968 to August 31, 1969. Your duties are to participate in all phases of our real estate business, including but not limited to, the acquisition, sale, development and management of commercial and industrial real estate. You will devote your full time and best efforts and it shall be your sole and exclusive employment. Our place of business shall be at 8 West Street, Danbury, Connecticut and it is our intention that you shall perform your duties in our Danbury office and take up residence in the Danbury area. In connection with your taking up residence in the Danbury area, you shall be reimbursed for all reasonable moving expenses incurred.

Your salary shall be $30,000.00 per annum, payable bimonthly. In addition to the aforementioned salary, a reasonably priced auto will be leased for your use in order to carry out your business duties during the term of your employment. Finally, you shall be reimbursed for expenses incurred by you pursuant to your employment. Such expenses shall be authorized by our office and shall in all cases be reasonable, necessary and ordinary business expenses. The Treasury Department's definition of reasonable, ordinary and necessary business expenses for income tax purposes shall serve as a guideline in interpreting this last provision. The foregoing items are to be your sole remuneration.

In addition to your remuneration, you may invest your own money for a participation in the equity of any real estate venture we may enter into. Your participation shall not exceed 15%. You shall be required to indicate your intention to participate at the inception of the deal, and conversely, you shall have no right to participate in any venture in which our office has made an

investment prior to your exercising your option to participate.

It is understood that you have opted to participate to the extent of 15% in our Tampa venture. As a 15% partner you will, of course, be liable for all regular expenses incurred by this venture as any other partner would. It is understood that your salary and expenses until July 1st shall be included in these expenses. It has also been agreed that if and when the Tampa lease as presently constituted is closed, you are to receive a commission according to the following formula: $30,000.00 minus ½ of all expenses reasonable attributed to the Tampa venture (including your salary and expenses up and until July 1, 1968). This formula is based on the assumption that you will receive additional commissions from other partners for this deal in the amount of $10,000.00 or more. If you do not receive at least $10,000.00 the difference will be made up to you.

If the above mentioned Tampa lease is not closed, you shall be entitled to 2½% commission on any acceptable leases entered into by us concerning this property according to the terms as set out in your March 31, 1968 employment agreement.

This contract shall supercede and render null and void a previous contract entered into between you and Lazarus Heyman dated March 31, 1968.

By Annette Heyman
(Mrs.) Annette Heyman

Agreed to Robert S. Kline